IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

TUESDAY, THE 21ST AUGUST 2007 / 30TH SRAVANA 1929

WP(C).No. 15971 of 2006(B)

OS.148/1994 of PRINCIPAL SUB COURT,KOCHI
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PETITIONER:

K.M. BASHEER,
23/529, MADHURA COMPANY ROAD, KOCHI-6.

BY ADV. SRI.S.VINOD BHAT

RESPONDENT:

M/S. TRIE-TEA TRADING COMPANY LTD.,
24/1480, KINGS BUILDINGS, 5TH MAIN ROAD,
WILLINGDON ISLAND, KOCHI-2, REPRESENTED BY ITS
MANAGING DIRECTOR, TOM THOMAS, S/O.LATE O.C.THOMAS
C.C.12/435, SUJATHA ROAD, CHULLICKAL, KOCHI-5.

BY ADV. SRI.K.N.SIVASANKARAN
SRI.V.V.ASOKAN
SRI.SUNIL SHANKER

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 21/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX(WPC 15971/06)

PETITIONER'S EXTS.:

EXT.P1: COPY OF THE DECREE DATED 9.4.99 IN O.S.148/94 ON THE FILE OF THE ADDL. SUB COURT, KOCHI.

EXT.P2: COPY OF THE DECREE DATED 20.6.03 IN A.S.179/2000 ON THE FILE OF THE DISTRICT COURT, ERNAKULAM.

EXT.P3: COPY OF THE EXECUTION PETITION FILED BY THE PETITIONER AS E.P.121/04 IN O.S.NO.148/94 BEFORE THE SUB COURT, KOCHI DATED 30.9.04.

EXT.P4: COPY OF THE JUDGMENT DATED 9.4.99 IN O.S.148/94 OF ADDITIONAL SUB COURT, KOCHI.

EXT.P5: COPY OF JUDGMENT DATED 20.6.03 IN A.S.179/2000 ON THE FILE OF THE DISTRICT COURT, ERNAKULAM.

EXT.P6: COPY OF THE ORDER DATED 27.2.2006 IN E.P.121/04 IN O.S.NO.148/94 ON THE FILE OF THE PRINCIPAL SUB COURT, KOCHI.

PIUS C. KURIAKOSE, J.

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W.P.(C)No.15971 OF 2006

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DATED THIS THE 21st AUGUST, 2007

J U D G M E N T

The defendant-decree-holder is aggrieved by Ext.P6 order by which the execution petition filed by him was dismissed by the execution court holding not only that there is no executable decree but also that the trial court should not have passed the decree/order which was sought to be executed by the petitioner. Ext.P1 is the decree in question.

2. The suit was filed by the respondent for a permanent prohibitory injunction and it was found by the court that the respondent who was not entitled for the injunction had put up certain unauthorised constructions on the plaint property during the pendency of the suit taking advantage of the order of temporary injunction which had been passed in their favour. Accordingly while dismissing the suit, the trial court, with the obvious object of maintaining status quo ante, directed the respondent-plaintiff to remove the unauthorised constructions. The decree reads as follows:-

"That the suit be and the same is hereby decreed

that the suit is dismissed with a direction to the plaintiff to remove the unauthorised constructions put up in plaint item 4 during the pendency of the suit within two months, failing which the defendant shall be allowed to approach the executing court for redressal."

According to the execution court, Ext.P1 cannot be treated as a decree since it does not satisfy any of the ingredients required for an executable decree provided under Section 2(2) of the Code of Civil Procedure. That court goes to the extent of finding that since the decree does not reveal any counter-claim made by the defendant-petitioner on the basis of which relief could have been given to him, the direction issued in his favour under Ext.P1 is not capable of being executed at all, since such a direction does not amount to a mandatory injunction.

3. I had occasion to consider the scope and meaning of the expressions "decree-holder", "holder of decree" etc. in my judgment in **Thampi v. Malathi** (2005 (4) KLT 575). The execution court is right in its view that the direction in Ext.P1 passed in favour of the petitioner-defendant does not amount to a decree as defined under Section 2(2) of the Code. But it certainly amounts to an executable

order in favour of the petitioner and therefore the petitioner does qualify as decree-holder in terms of Section 2(3) of the Code of Civil Procedure. Since the interest in the executable order is retained by him, he qualifies also as a holder of the decree/executable order and is therefore entitled to maintain an E.P. under Order XXI Rule 10 C.P.C. The respondent against whom an executable order is passed is a judgment-debtor in terms of Section 2(10) C.P.C. A slight defect in the drafting of Ext.P1 notwithstanding, it was not difficult for anybody to appreciate Ext.P1 as a negative decree dismissing the suit and a positive order in favour of the defendant directing the plaintiff to remove the unauthorised constructions. Being holder of an order which is expressed in Ext.P1 itself to be executable in the event of non-compliance by the respondent, the execution petition filed by the petitioner-defendant was perfectly maintainable and the court below erred in rejecting the same.

4. Interestingly, the execution court, while passing the impugned order, has gone to the extent of finding fault with the trial court for having passed Ext.P1. Ext.P1 had been confirmed in appeal by this Court. Nobody contended before the execution court that Ext.P1 was passed without jurisdiction and hence Ext.P1 is a nullity.

The execution court also does not say that the trial court lacks in jurisdiction to pass Ext.P1 but only holds Ext.P1 to be illegal. According to me, the execution court in its eagerness to find fault with the trial court has forgotten the limits of its own jurisdiction as an execution court whose duty it was to execute Ext.P1 which, as already indicated, had been confirmed by this Court also.

5. Incidentally it will be noticed that the criticism of Ext.P1 by the execution court was totally unjustified. Indian courts administer, in given situations, not only law but principles of equity also. The suit in question was one for injunction. It was found that the plaintiff who was not entitled for injunction had put up unauthorised constructions on the strength of a temporary injunction order wrongly passed in their favour and the court, while finally deciding the suit, also decided on considerations of justice and equity that status quo ante should be ordered to be maintained and hence directed removal of the constructions so put up. The order passed in favour of the petitioner under Ext.P1 was rightly passed by the trial court and that was why this Court in appeal confirmed the same.

6. I set aside Ext.P6 and hold that the execution petition filed by the petitioner is maintainable in law. I direct the execution court to

enquire into the execution petition and dispose of the execution petition in accordance with law.

The Writ Petition is allowed as above. No costs.

(PIUS C.KURIAKOSE, JUDGE)

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